

Summer 1998

## Book Review

North Carolina Journal of International Law and Commercial Regulation

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### Recommended Citation

North Carolina Journal of International Law and Commercial Regulation, *Book Review*, 23 N.C. J. INT'L L. & COM. REG. 737 (1997).  
Available at: <http://scholarship.law.unc.edu/ncilj/vol23/iss3/2>

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## Book Review

### **Cover Page Footnote**

International Law; Commercial Law; Law

## BOOK REVIEW

### INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS.

**Robert J. Beck, Anthony Clark Arend & Robert D.  
Vander Lugt. New York: Oxford University Press,  
1996. Pp. xvi, 310. \$39.95 (hardcover).**

*Reviewed by Raj Bhala<sup>†</sup>*

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## I. Introduction

Ostensibly, international legal theory and international relations theory are different academic worlds. International legal theory involves unstructured musings about the sources of international law and its enforceability. International relations theory, on the other hand, considers the way states interact through diplomacy or war.

On closer examination the sources and enforceability of international law depend very much on the extent to which states cooperate and what causes them to cooperate. The manner in which states interact depends very much on the framework of rules in which they operate, the framework of rules they seek to build, and whether they view these frameworks as obligatory and just. More generally, international legal and international relations theorists have a shared interest in the pre-conditions for international order and peaceful change since both groups want to understand how binding, fair rules can be created to foster stability and manage transitions.

Until now, the only way to appreciate this shared interest was to identify leading theoretical pieces in international relations journals and international law reviews, access and digest these separately, and then construct some sort of synthesis. Even for the skilled interdisciplinary scholar, this task was formidable. Fortunately, Robert J. Beck, Anthony Clark Arend, and Robert D. Vander Lugt (the Editors) have brought together eight leading articles from both worlds in one 310-page volume.<sup>1</sup> But, their anthology, *International Rules*, is more than just a convenient tool.

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<sup>1</sup> INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (Robert J. Beck et al. eds., 1996).

With one exception (discussed in Part III below), the excerpts in *International Rules* are testament to the commonality of fundamental issues of interest to international legal and international relations theorists. The Editors have produced an exciting volume that helps transcend conventional compartmentalized thinking and sketches a tantalizing agenda for future interdisciplinary work.

Part II of this Book Review identifies three provocative issues of interest to both groups of theorists, and sets out how different theoretical schools approach these issues.<sup>2</sup> First, is international law really “law”? Second, is there a relationship between international law and morality, and if so, what is it? Third, does international law “matter” in the sense of influencing state behavior, and if so, then why are states influenced by it, *i.e.*, why do they endeavor to comply with it?<sup>3</sup> Part II suggests that there are

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<sup>2</sup> See *infra* notes 7-233 and accompanying text.

<sup>3</sup> By no means is this list exclusive of the issues at the intersection of international legal and international relations theory or of the issues treated in *INTERNATIONAL RULES*. For instance, a fourth issue addressed in the anthology is how international law is formulated. Insofar as both international legal and international relations theorists seek to promote stability and peaceful change in the world, and insofar as both groups of theorists believe international law can be a means to this end, then the processes by which international law comes about, and is modified, is important.

To address how international law is formulated, the Editors have chosen an excerpt from the New Haven School. In this excerpt, Professors McDougal and Lasswell seek to move beyond the debate about whether international law really is “law.” See Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1 (1953), reprinted in *INTERNATIONAL RULES*, *supra* note 1, at 113, 138. They take an interdisciplinary approach and study the values and contexts that shape international law. See *INTERNATIONAL RULES*, *supra* note 1, at 110-11. Their work is characterized by long lists of variables to determine whether a system of world public order promotes their proposed core value, human dignity. For instance, McDougal and Lasswell encourage the examination of eight variables, namely (1) power (to what extent is it concentrated?); (2) wealth (to what extent is it concentrated?); (3) respect (to what extent is minimum respect accorded every person?); (4) well-being (to what extent are the physical health and welfare of each person taken care of?); (5) skill (to what extent is each person given an opportunity to increase her occupational skills through educational and other means?); (6) enlightenment (to what extent is the gathering, transmission, and dissemination of information protected?); (7) rectitude (to what extent is each person free to worship?); and (8) affection (to what extent is the family unit and other institutions of congeniality protected?). See McDougal & Lasswell, *supra*, at 129-36.

The reader is sure to be struck by two conflicting reactions. First, the variables

tremendous opportunities for cross-fertilization between international legal and international relations theory. Additionally, Part II guides the reader through the challenging material encountered and also casts the material thematically to allow for a comparative analysis of the theories on an issue-by-issue basis.

Part III evaluates *International Rules* critically, discussing three shortcomings of the anthology.<sup>4</sup> First, the piece on so-called "New Stream" international legal scholarship requires too much effort for too little gain. Second, there is no coverage of an exciting school of thought in international relations theory known as "Post-International," or "Turbulence," theory. Third, too much attention is devoted to rules of public international law, at the cost of an equally (or arguably more) significant branch of international law, namely, international trade law. These shortcomings, however, in no way detract from the overall achievement of the Editors. They have done a marvelous job in synthesizing illuminating pieces and stimulating creative thought. Further, their introductory notes before each excerpt, and the first and last chapters they authored, are helpful to both novice and seasoned theorists.<sup>5</sup>

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seem like a useful conceptual framework in which to organize and compare different systems of public order. Second, the variables are obvious and in effect amount to a broad and abstract way of defining human rights. The conflict is exacerbated by the New Haven School's list of variables expressly designed to compare different systems of public order. These variables are (1) conceptions of law (*e.g.*, perspectives on authority and control); (2) features of power processes protected by law (*e.g.*, how jurisdiction is divided among sovereign states); and (3) features of basic value processes protected by law (*e.g.*, the degree to which wealth, enlightenment, respect, well-being, skill, rectitude, and affection are protected). *See id.* 126-36. It is altogether unclear how this list relates to the first list. Equally unclear is how the second list markedly differs from indicia of the international rule of law. Ultimately, some readers will be energized in their thinking by the lists, whereas others will find no value added by the lists. Whatever the final judgment, however, all readers are likely to share in the feeling that the lists—ironically—do not say much about how international law is formulated in a mechanical sense, or why it is formulated in a conceptual sense.

<sup>4</sup> *See infra* notes 234-93 and accompanying text.

<sup>5</sup> Legal theorists reading *INTERNATIONAL RULES* who are wholly unfamiliar with international relations theory, or who seek a deeper appreciation of this theory, might want to turn to two recent books on this theory. *See* JAMES E. DOUGHERTY & ROBERT L. PFALTZGRAFF, JR., *CONTENDING THEORIES OF INTERNATIONAL RELATIONS: A COMPREHENSIVE SURVEY* (4th ed. 1997); *INTERNATIONAL THEORY: CRITICAL INVESTIGATIONS* (James Der Derian ed., 1995). As for international relations theorists

Finally, Part IV concludes that *International Rules* illustrates the declining feasibility of a meta-theory which encompasses all issues in international affairs.<sup>6</sup>

## II. Approaches to Three Fundamental Issues

### A. *International Law as "Law"*

Is international law really "law"? This issue has dominated the agenda of international legal theorists. *International Rules* offers selections from two jurisprudential perspectives on the issue, Natural Law and Legal Positivism. While international relations theorists seem to have ceded the issue to legal theorists, the international relations theorists hardly can be disinterested in the outcome. If lawyers do not believe international law really is "law," then why should international relations theorists take that law seriously? Why should they deem it worthy of consideration as a possible influence on state behavior? Put differently, if international law is not really "law," then the Realist schools of international relations (discussed below) must be right in declaring that international law and compliance therewith are epiphenomenal.

#### 1. *Natural Law Theory*

To represent Natural Law theory, the Editors select *Prolegomena*, the prologue to Hugo Grotius's treatise, *De Jure Belli ac Pacis*.<sup>7</sup> This excerpt by the father of modern international law lays out the distinction between the law of nature and the law of nations (*i.e.*, international law). Grotius suggested that there are essential traits implanted in man by God, such as the desire for

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wholly unfamiliar with jurisprudence, or wanting a firmer grounding in jurisprudence, there are myriad legal theory books, though few focus on international legal theory issues. This reviewer's favorite text in this area is M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE (6th ed. 1994).

<sup>6</sup> See *infra* notes 295-96 and accompanying text.

<sup>7</sup> HUGO GROTIUS, *Prolegomena*, in DE JURE BELLI AC PACIS (1625) (The Law of War and Peace), reprinted in INTERNATIONAL RULES, *supra* note 1, at 38-53. For a discussion of this treatise and its historical and philosophical context, see MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1-4 (1993); LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS xxi-xxv (3d ed. 1993).

social order.<sup>8</sup> These traits give rise to Natural Law, the rules which govern individuals within a state.<sup>9</sup> Grotius described Natural Law as eternally and universally valid, *i.e.*, it transcends time, place, political systems, and culture.<sup>10</sup> Further, Natural Law can be ascertained by human reason.<sup>11</sup> The law of nations, by contrast, can be derived from the practice of states.<sup>12</sup>

This distinction raises two problems. First, it is unclear whether these bodies of law are different, whether they are co-extensive, or whether one is derivative of the other. For Grotius, the two bodies are very nearly the same, that is, both impose the same obligations on states. For example, he declared it to be a rule of nature to abide by pacts.<sup>13</sup> Contemporary international lawyers know this rule of public international law by the name of *pacta sunt servanda*. It should be noted that Grotius had to take this position to avoid undermining a basic tenet of his theory. To have admitted that the two bodies are distinct would have been to admit that God is not the overarching source of law. Instead, his work suggests that few rules of the law of nations are not also Natural Law.

A second problem with the distinction drawn by Grotius is that it is unclear whether the law of nations qualifies as "law." Grotius did not accept the cynical view that the law of nations is not "law" but rather expediency among states. He observed that the law of nations derives from a need for certainty and predictability,<sup>14</sup> and further that even in times of war there are rules that states follow to ensure the war is just.<sup>15</sup> Thus, for Natural Law theorists, a law is binding even if it lacks a sanction to enforce it, because of God's judgment, which may be manifest in this life or the afterlife. Indeed, Grotius could not possibly have accepted the cynical view. As he admitted, he wanted greater civility in the behavior of states

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<sup>8</sup> See GROTIUS, *supra* note 7, at 39-40.

<sup>9</sup> See *id.* at 41.

<sup>10</sup> See INTERNATIONAL RULES, *supra* note 1, at 34.

<sup>11</sup> See GROTIUS, *supra* note 7, at 42.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* at 44.

<sup>15</sup> See *id.* at 44-45.



toward one another.<sup>16</sup>

## 2. Legal Positivism

### a. Austinian Positivism

Legal Positivists differ from Grotius and among themselves on the resolution to the second problem. However, Legal Positivists are linked by a common belief that the only source of law is consent. Their inquiry is not into what the law ought to be, but rather with what the law is. They look askance on the naturalist notion that law can be rationally derived from a metaphysical source, and as far as possible they want to avoid imbuing the concept of law with morality.<sup>17</sup>

A starting point for Legal Positivism is the British jurist John Austin (1790-1859), and his 1832 published lectures, *The Province of Jurisprudence Determined*.<sup>18</sup> Austin intones that international "law" is nothing more than positive cross-border morality, on par with "laws" of fashion or of honor.<sup>19</sup> "Law," for Austin, is the command of a sovereign that is habitually obeyed and enforced by a sanction.<sup>20</sup> In simple formulaic terms, "law" equals an order plus a sovereign plus a threat. The international system lacks three fundamental institutions implicitly required by this formula: a supreme legislature to enact rules, a supreme judiciary to interpret rules, and a supreme executive to enforce rules. These institutions can coalesce into one central authority, but the international system lacks even this manifestation. Therefore, in Austin's view, international rules cannot properly be dubbed "law."<sup>21</sup>

Perhaps Austin was influenced by the writings of early Classical Realists, namely Thucydides's *The Peloponnesian War*

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<sup>16</sup> See *id.* at 45.

<sup>17</sup> See INTERNATIONAL RULES, *supra* note 1, at 58.

<sup>18</sup> See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfred E. Rumble, ed., 1995).

<sup>19</sup> See INTERNATIONAL RULES, *supra* note 1, at 57.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

and Machiavelli's *The Prince*.<sup>22</sup> These early works suggest that power, not law, is the basis for international order. Undoubtedly, Austin's work has had considerable direct or indirect influence on the celebrated writings of recent Classical Realists, including: E.H. Carr's *The Twenty Years' Crisis 1919-1939* (1939), Hans Morgenthau's *Politics Among Nations: The Struggle for Power and Peace* (1948), and Stanley Hoffmann's *The Relevance of International Law* (1971). For Carr, behind all law is politics, hence international law is nothing more than international politics.<sup>23</sup> While Morgenthau is willing to concede international law exists and is typically observed by states, he resists strongly the notion that it is an effective restraint on the struggle among states for power.<sup>24</sup> Its non-existent or decentralized legislative, adjudicatory, and enforcement mechanisms render it imprecise and weak.<sup>25</sup> States exploit it to promote their interests and evade it when compliance would cut against their self-interest.<sup>26</sup> Hoffman does not find international law to be a part of political reality, again because of the anarchical nature of the international system and the obsession of states with their self-interest.<sup>27</sup> In a most memorable reference, Hoffman sardonically calls international law the most powerful training ground for the imagination.<sup>28</sup>

#### *b. Kelsen's Positivism*

The Austrian jurist Hans Kelsen (1881-1973) and the British legal philosopher H.L.A. Hart (1907-1992) are eager to rescue international law from Austin's dustbin of morality. The excerpts in *International Rules* from their writings ought to give pause to

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<sup>22</sup> See *id.* at 94. For a concise introduction to Realism, see JAMES N. ROSENAU & MARY DUFFEE, *THINKING THEORY THOROUGHLY* ch. 2 (1995). For a provocative account of the enduring importance to Realism of Thucydides and other early theorists, see MICHAEL W. DOYLE, *WAYS OF WAR AND PEACE* pt. 1 (1997).

<sup>23</sup> See *INTERNATIONAL RULES*, *supra* note 1, at 94-95.

<sup>24</sup> See *id.* at 95-96.

<sup>25</sup> See *id.* at 96.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.* at 96-97. For a full discussion of the significance of anarchy in international relations theory, see BRIAN C. SCHMIDT, *THE POLITICAL DISCOURSE OF ANARCHY* (1998).

<sup>28</sup> See *INTERNATIONAL RULES*, *supra* note 1, at 97.

Classical Realists. Kelsen finds that Austin overplays the importance of negative sanctions. In an excerpt selected by the Editors from his lectures published in 1942, *Law and Peace in International Relations*, Kelsen suggests that international law is "law," at least in the primitive sense.<sup>29</sup> Kelsen bases this conclusion on the doctrine of *bellum justum* (just war), a decentralized sanctions mechanism utilized by states acting in concert.<sup>30</sup> States regard reprisals against another state, or the use of force by one state against another state, as illegal ("delictual," as Kelsen puts it), unless the reprisal or use of force is a sanction in response to a prior illegal act (*i.e.*, a prior "delict").<sup>31</sup>

This doctrine, in turn, assumes states have identified certain conduct to be illegal. Universally accepted examples of such delicts are an unprovoked physical invasion of another state's territory, or a failure to observe a treaty. Thus, for Kelsen a pre-defined international rule is "law" if a sanction (1) is attached to that rule, (2) is condoned by the international community, and (3) may be used only in response to a violation of that rule.<sup>32</sup> After all, if forcible interference in the affairs of other states is allowed regardless of the prior occurrence of a delict, then we have not "law" but "lawlessness." The very existence of the doctrine of *bellum justum*, is enough for Kelsen to conclude international "law" exists because the doctrine meets all three tests.<sup>33</sup>

Unfortunately for Kelsen, his excerpt does nothing to dissuade the skeptical reader from the view that the whole argument is a legerdemain lacking in rigor or empirical support and filled with circularities and redundancies. The excerpt suggests that Kelsen infers too much about international law from just one narrow, albeit important, doctrine. Further, it does not convince the reader that, aside from a lack of concern about whether a sanctions mechanism is centralized, Kelsen places less emphasis on

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<sup>29</sup> See Hans Kelsen, *The Nature of International Law*, in *LAW AND PEACE IN INTERNATIONAL RELATIONS: THE OLIVER WENDELL HOLMES LECTURES* (1942) (lecture 2), reprinted in *INTERNATIONAL RULES*, *supra* note 1, at 60, 71.

<sup>30</sup> See *id.* at 64-69, 70-74.

<sup>31</sup> See *id.* at 63.

<sup>32</sup> See *id.* at 61-62.

<sup>33</sup> See *id.* at 66, 72-74.

sanctions than Austin.

These deficiencies are endemic to Kelsen's substance and style, not the result of poor judgment by the Editors.<sup>34</sup> They could be excused, perhaps, if Kelsen were able to rebut successfully doubts he raises about the *bellum justum* doctrine.<sup>35</sup> How can war be a sanction if its outcome is unpredictable and the winner may be the actor that committed the initial delict?<sup>36</sup> How can war be a sanction if there is no central adjudicator to decide whether the initial act indeed was a delict and, therefore, whether resort to war is not a delict itself but a legitimate response?<sup>37</sup> Kelsen labels the first question "[p]articularly serious," and the second one "[t]he most striking objection," but does not expand on these observations.<sup>38</sup> A third doubt is that the doctrine proves only that war is morally forbidden except in response to a delict, not that a large body of positive international law exists. Here, Kelsen's response is abstruse, if not feeble: it should be possible to prove states base their reciprocal behavior on a "juristic judgment" that war is a sanction.<sup>39</sup>

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<sup>34</sup> If there is any fault to be attributed to the Editors regarding their selection from Kelsen's work, it is that it does not cover a central idea in Kelsen's thinking, namely, the idea that all of international law is founded upon the idea of "*Grundnorm*." This norm is that states must behave as they have customarily behaved. While the Editors identify this contribution as "Kelsen's most significant modification of earlier Positivistic approaches," they discuss it only briefly in their note introducing Legal Positivism. INTERNATIONAL RULES, *supra* note 1, at 58. In contrast, the Editors include in the excerpt from H.L.A. Hart's, *The Concept of Law*, Hart's attack on Kelsen's view that international law rests on this basic norm. Hart finds a norm to be a luxury that helps ensure a set of rules is an integrated, coherent system, not a necessity to make the rules binding. In addition, Hart finds the *Grundnorm* proposed by Kelsen to be a pointless repetition of the observation that states observe certain standards of conduct as obligatory rules. At best, the *Grundnorm* is simply one of these standards. See INTERNATIONAL RULES, *supra* note 1, at 90-92. The editorial point is that a direct Kelsen-Hart interchange about the *Grundnorm* would have given balance to the topic. As it stands, the reader gets Hart's rebuttal but not Kelsen's opening salvo.

<sup>35</sup> See KELSEN, *supra* note 29, at 68-70 (discussing the *bellum justum* doctrine).

<sup>36</sup> See *id.* at 70.

<sup>37</sup> See *id.*

<sup>38</sup> *Id.*

<sup>39</sup> See *id.* at 69.

*c. Hart's Positivism*

Hart's brand of Legal Positivism, contained in his 1961 classic, *The Concept of Law*, is a more effective attempt at rescuing international law from Austin's morality dustbin. For Hart, a legal system is a union of primary rules and secondary rules.<sup>40</sup> Primary rules establish obligations, the "dos" and "don'ts."<sup>41</sup> Secondary rules are rules about rules, in particular, a rule of recognition (to specify the authoritative sources of primary rules), a rule of change (to explain how to alter primary rules), and a rule of adjudication (to interpret and resolve disputes about primary rules).<sup>42</sup> In the cogent excerpt selected from *The Concept of Law* by the Editors, Hart admits the international legal system lacks secondary rules and thus qualifies as "law" only in the primitive sense.<sup>43</sup> But, he systematically knocks out three pillars that support Austinian skepticism about the legal status of international rules.<sup>44</sup>

Hart finds the first pillar, that international rules are not "law" because there is no centrally organized sanction mechanism, to be simplistic.<sup>45</sup> A rule can be obligatory for reasons other than the existence of a sanction, for example, because the addressee of the rule feels a normative basis for compliance. Moreover, the first pillar is based on an analogy between the international and municipal system, but the factual contexts in these systems are distinct.<sup>46</sup> Aggression among states is less common than violence among individuals within a state.<sup>47</sup> Some individuals are prone to violence, hence there would be violence in a state without a centralized sanction mechanism.<sup>48</sup> But, there is peace among states

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<sup>40</sup> See H.L.A. Hart, *International Law*, in *THE CONCEPT OF LAW* ch. 10 (2d ed. 1994), reprinted in *INTERNATIONAL RULES*, *supra* note 1, at 75.

<sup>41</sup> See *INTERNATIONAL RULES*, *supra* note 1, at 58.

<sup>42</sup> See *id.*

<sup>43</sup> See HART, *supra* note 40, at 76.

<sup>44</sup> See *id.* at 77-79.

<sup>45</sup> See *id.* at 77-80.

<sup>46</sup> See *id.* at 79.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

despite the lack of such a mechanism in the international realm, in part because of the unpredictability of the course and outcome of aggression.<sup>49</sup>

Hart also finds Austin's second pillar simplistic.<sup>50</sup> This pillar states that a nation cannot properly be the subject of international "law" because it is sovereign. Consequently, nations follow international rules only if they want to do so.<sup>51</sup> Hart finds this pillar misconceives state sovereignty as absolute and unlimited.<sup>52</sup> In reality, sovereignty is manifest to varying degrees in different countries depending on their relative economic, political, military, demographic, and cultural positions.<sup>53</sup> Further, to say states cannot be bound by international rules because of their sovereignty wrongly inverts the inquiry and prematurely closes the dialog.<sup>54</sup> What should be explored initially is whether, and to what extent, international rules afford sovereign authority to states.<sup>55</sup> In other words, Hart argues, how can one know what sovereignty states have until one knows what the international rules are? Here the reader must forgive Hart for not so much formulating an argument as cleverly shifting the burden of proof. Finally, as a factual matter, it has never been questioned that new states are bound by international rules.<sup>56</sup> This practice ought to suggest that international rules are more than merely self-imposed obligations.<sup>57</sup>

The third pillar of Austinian skepticism is that states in the international arena are like individuals in primitive society.<sup>58</sup> Only primary rules exist, hence these rules in the international arena are better characterized as morality than law.<sup>59</sup> Hart finds this pillar

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<sup>49</sup> See *id.* at 79-80.

<sup>50</sup> See *id.* at 80-85.

<sup>51</sup> See *id.* at 81-83.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See *id.* at 85-88.

<sup>59</sup> See *id.* at 85.

infirm in a number of respects. First, it misuses the term "morality" in an overly broad manner.<sup>60</sup> Rules of games, clubs, and etiquette are thrown into the dustbin, along with international rules.<sup>61</sup> Second, states often say nothing about morality when they make claims, or raise defenses, against other states.<sup>62</sup> Typically, their appeals are to technical provisions of treaties or to custom.<sup>63</sup> Third, international rules often are morally indifferent.<sup>64</sup> That is, they are designed to maximize certainty and predictability, and facilitate the proof or assessment of claims, *i.e.*, they are formalisms and legalisms.<sup>65</sup> Finally, states may comply with an international rule not out of moral obligation, but rather out of rational self-interest based on a cost-benefit analysis.<sup>66</sup>

### 3. *The New Haven School*

Neither Natural Law theory nor Legal Positivism has a stranglehold on the issue of whether international law really is "law." The New Haven School, whose most notable proponents are Professors Myres S. McDougal and Harold D. Lasswell, offer a formula for "law" that differs from the other theories. For them, a rule is law if it has two elements, authority and control.<sup>67</sup> Authority is a subjective element that goes to the competency of a decision maker: do the addressees of the rule subjectively perceive the rule-issuing entity to be legitimate?<sup>68</sup> Control is an objective element: do the addressees of the rule have an effective voice (whether or not authorized) in decision, and does the rule actually affect the behavior of the addressees?<sup>69</sup> Though they spend no time defending their concept of law, McDougal and Lasswell are comfortable calling international rules "law" because they find

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<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> *See id.* at 86.

<sup>63</sup> *See id.*

<sup>64</sup> *See id.* at 86-87.

<sup>65</sup> *See id.*

<sup>66</sup> *See id.* at 87.

<sup>67</sup> *See* McDougal & Lasswell, *supra* note 3, at 120.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

both elements in such rules.<sup>70</sup>

Do the excerpts in *International Rules* about Natural Law, Legal Positivism, and the New Haven School lead the international relations theorist to assume safely that international law really is "law"? To be sure, the international legal system may not be as well developed as municipal law systems—though the gap may be narrowing, as intimated by the discussion of international trade law in Part III below. But, there exists a sufficient body of jurisprudence to indicate that lawyers take international law seriously, so international relations specialists ought to do the same.

### *B. International Law and Morality*

Is there a relationship between international law and morality, and if so, what is it? International legal and international relations theorists care about the answer because it tells them whether appeals to international law as a possible constraint on state behavior are morally meaningful. Presumably, an international legal rule imbued with morality is more forceful—it packs a "just punch"—than a morally empty one. This is particularly true if there is no centralized enforcement mechanism. Alternatively, it might be supposed that talking about morality in the international political context is quixotic, even dangerous, if it leads to underestimating security threats.

#### *1. Natural Law Theory*

Legal Positivists obviously respond to the issue by asserting there is no necessary connection between law and morality. For centuries, this response has influenced many legal approaches to justice in the international arena. Indeed, in his 1995 book, *The Restructuring of International Relations Theory*, Mark Neufeld argues that theory oriented toward human emancipation is underdeveloped because of the predominance of Positivism which lacks any emancipatory content.<sup>71</sup>

Positivism has not been the only response to the issue. To

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<sup>70</sup> See *id.* at 121-22.

<sup>71</sup> See MARK NEUFELD, *THE RESTRUCTURING OF INTERNATIONAL RELATIONS THEORY* 1-4 (1995).



Natural Law theorists like Grotius, and before him Cicero (106-43 B.C.), Saint Thomas Aquinas (1224-74), and the Spanish Jesuit scholars such as Father Francisco de Vitoria (1483-1546), the answer is that international law and morality are connected.<sup>72</sup> In their view, the key feature of an international rule that makes it obligatory is the embodiment of a Natural Law principle. Through such an embodiment, states are bound in their external relations by divine principles knowable to humans through revelation or reason. Moreover, God's punishment against unjust actors is an ample gap-filling sanction in an international environment lacking a centralized human enforcement mechanism.<sup>73</sup> Thus, as Grotius assiduously points out, at least since the Roman Era, states have recognized that war must be prosecuted in a manner free from reproach in order to be just.<sup>74</sup>

## 2. *The New Haven School*

Of course, analysis of international law from a normative perspective did not die with Grotius. The Natural Law legacy is evident in New Haven School thinking.<sup>75</sup> This School emphasizes the processes by which, and the institutions through which, international law is created.<sup>76</sup> But, its proponents, Professors McDougall and Lasswell, do not hide the normative dimension of their project. They seek knowledge about processes and institutions in order to advance the cause of human dignity, which they propose as the core value of the international system.<sup>77</sup> By "human dignity" they mean "a social process in which values are widely and not narrowly shared, and in which private choice,

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<sup>72</sup> See INTERNATIONAL RULES, *supra* note 1, at 34-36.

<sup>73</sup> See GROTIUS, *supra* note 7, at 43.

<sup>74</sup> See *id.* at 44-45.

<sup>75</sup> The influence of Natural Law theory is also evident in many other important works. See THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995) (developing a theory of fairness and arguing that international law has the ability to advance abstract social values); CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979) (developing a normative theory of international political economy based on the justice of a state's domestic institutions and the principle of international distributive justice to achieve a fair division of wealth across the globe).

<sup>76</sup> See INTERNATIONAL RULES, *supra* note 1, at 110-11.

<sup>77</sup> See *id.* at 111.

rather than coercion, is emphasized as the predominant modality of power.”<sup>78</sup> They want to engage in a “*continuous reappraisal of the circumstances in which specific institutional combinations can make the greatest net contribution to the overarching goal*” of human dignity.<sup>79</sup> Their candor reminds us of Grotius’s statement that the law of nations has “in view the advantage, not of particular states, but of the great society of states.”<sup>80</sup> States, in other words, ought to emphasize not their relative power positions, but their shared interest in promoting the dignity of each individual.

### 3. Feminist Legal Theory

Likewise, feminist legal scholars have been influenced by Natural Law thinking. In a fascinating excerpt in *International Rules*, Hilary Charlesworth, Christine Chinkin, and Shelley Wright rightly observe that the power structure in municipal legal systems is dominated by men.<sup>81</sup> This male-dominated structure is replicated at the international level.<sup>82</sup> Most positions in international organizations, and certainly virtually all of the senior-most offices, are held by men.<sup>83</sup> They point out embarrassing, if not grotesque, facts: (1) at present trends, it will take until 2021 for half of the professional posts in the United Nations to be held by women; (2) only one woman has been a judge on the International Court of Justice; and (3) no woman has served on the International Law Commission.<sup>84</sup> The gender asymmetry means that international law addresses issues of interest to men.<sup>85</sup> Men mis-conceptualize international law as necessarily resting on the public-private distinction.<sup>86</sup> They regard the proper province of

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<sup>78</sup> McDougal & Lasswell, *supra* note 3, at 122.

<sup>79</sup> *Id.* at 116 (emphasis in original); cf. *id.* at 122, 138-39.

<sup>80</sup> GROTIUS, *supra* note 7, at 42.

<sup>81</sup> See INTERNATIONAL RULES, *supra* note 1, at 254.

<sup>82</sup> See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991), reprinted in INTERNATIONAL RULES, *supra* note 1, at 256, 263.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* at 263-64.

<sup>85</sup> See *id.* at 264-69.

<sup>86</sup> See *id.* at 265.

international law as the public realm.<sup>87</sup> The private realm—the world of home and hearth—is off limits to international law.<sup>88</sup>

This situation has disastrous consequences for women because they are frequently victims in the private realm. In particular, they suffer from pervasive and severe physical and emotional domestic abuse. Such abuse is not governed by international human rights law. For example, “torture,” as defined in the United Nations Convention Against Torture is confined to acts inflicted by public officials (or those acting in an official capacity) to punish, intimidate, coerce, or discriminate.<sup>89</sup> As far as international human rights law is concerned, the feminist legal theorists correctly note that men are free to beat their wives at home.<sup>90</sup> There are few international legal instruments which address women’s issues, and the ones that do are riddled with exceptions and reservations. For instance, over 40 of the 105 parties to the International Labor Organization’s Women’s Convention—the most prominent such instrument—have taken a total of about 100 reservations.<sup>91</sup> In sum, the feminist legal scholars poignantly illustrate that apparently neutral systems of rules can be, and are, gender biased. The resulting impact of this bias on women is cruel and sometimes deadly.

Like the New Haven School, feminist legal scholars also care about the normative content of international law. Neither group of theorists could possibly accept the Positivist conception of a divorce between law and morality. The feminists, in particular, argue persuasively for international law to accord higher priority to economic, social, and cultural rights (as well as traditional, political and civil rights) so as to emancipate women.<sup>92</sup> Equally persuasive is their argument that the law ought to consider the effects on women of extant international rights accepted by men, namely, the right to development (*e.g.*, how are women affected by economic development?) and to self-determination (*e.g.*, how are

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<sup>87</sup> *See id.* at 265-66.

<sup>88</sup> *See id.*

<sup>89</sup> *See id.* at 267.

<sup>90</sup> *See id.* at 268.

<sup>91</sup> *See id.* at 271.

<sup>92</sup> *See id.* at 272-76.

women treated by men in freedom-fighter movements?).<sup>93</sup> These arguments harken back to Natural Law theory.

If there is one missing piece about which the reader of *International Rules* is likely to wonder, it surely is the influence of religion on the normative content of international law as it relates to human rights. To what extent do religious beliefs—and here Islam is in for special scrutiny—retard the progressive development of the law in the feminist direction? The feminist authors touch on Islam<sup>94</sup> but they seem a bit unwilling to tackle it head on, perhaps for fear of appearing prejudiced. Instead, what is needed is an objective appraisal of world religions and their effect on the international legal rights of women.

#### 4. Classical Realism

In stark contrast to Natural Law theory and the contemporary schools it has influenced stand the Classical Realists. They vehemently oppose conceptualizing a link between international law and morality, particularly when such a link might have policy ramifications. George Kennan, in an excerpt from his famous 1951 book, *American Diplomacy*, argues forcefully that any attempt at linking international law and morality is pure hearted, but empty headed sentimentality with potentially horrendous consequences.<sup>95</sup> Kennan, the “intellectual architect”<sup>96</sup> of America’s Cold War policy of containing communism, ferociously attacks what he calls the “legalistic-moralistic” approach to international relations.<sup>97</sup> Legalistic moralists believe it is possible to suppress chaos and danger through international law.<sup>98</sup> The hidden assumption underlying their optimism is that Anglo-Saxon legal

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<sup>93</sup> See *id.* at 276-80.

<sup>94</sup> See *id.* at 273-74.

<sup>95</sup> See GEORGE F. KENNAN, *AMERICAN DIPLOMACY* 91-103 (expanded ed. 1984) (1951). For an iconoclastic history of American diplomacy from the 1890s to the 1970s, see WILLIAM APPLEMAN WILLIAMS, *THE TRAGEDY OF AMERICAN DIPLOMACY* (1959).

<sup>96</sup> *INTERNATIONAL RULES*, *supra* note 1, at 96.

<sup>97</sup> See GEORGE F. KENNAN, *Diplomacy in the Modern World*, in *AMERICAN DIPLOMACY* ch. 6 (expanded ed. 1984) (1951), *reprinted in* *INTERNATIONAL RULES*, *supra* note 1, at 99, 101.

<sup>98</sup> See *id.* at 101-02.

concepts applicable to individuals in a municipal system are applicable to states in the international system.<sup>99</sup> Not surprisingly, followers of this approach prefer to resolve disputes by reference to a set of agreed-upon rules interpreted by competent judicial entities.<sup>100</sup> Their preference assumes that all peoples agree (or can be persuaded through reason) that their aspirations ultimately are less important than international order and stability.<sup>101</sup> Kennan charges that legalistic moralists commit seven blunders in taking this view.

First, they wrongly assume that all states are reasonably content with their status (*e.g.*, their borders) and that states will suppress their desire for change to preserve international order and stability.<sup>102</sup> In Kennan's view, this assumption grossly underestimates the number of maladjustments and discontents around the world and the tremendous sacrifices they will make to realize their aims.<sup>103</sup> In an era of suicidal terrorist threats, Kennan's point is well taken.

Second, legalistic moralists empower states, and bolster their sovereignty, by ignoring physical, political, and economic distinctions among states and by supporting the one state-one vote principle in international organizations.<sup>104</sup> Sovereign states are not, however, the exclusive (or even predominant) players in the international arena, and they are not all equal in political, economic, military, or cultural power. Ignoring non-state actors, and differences among states, is naive.

Third, legalistic moralists are blind to the constant flux in the pattern and power of states.<sup>105</sup> They fail to appreciate how

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<sup>99</sup> *See id.*

<sup>100</sup> *See id.* at 102.

<sup>101</sup> *See id.*

<sup>102</sup> *See id.* at 103.

<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

<sup>105</sup> *See id.* For an argument that the concept of power ought to be disaggregated into (1) relational power (*i.e.*, the Classical Realist concept of one state compelling another to do something it would not otherwise do) and (2) structural power (*i.e.*, the ability to shape and determine the structure of the international political economy in which other states and multinational corporations must operate), see SUSAN STRANGE, *STATES AND MARKETS* 24-42 (2d ed. 1988).

dynamic, even unstable, states are.<sup>106</sup> As a result, instead of seeking ways to facilitate peaceful change, legalistic moralists impose international law on states like a "strait jacket" in order to preserve the *status quo*.<sup>107</sup> Indeed, proponents of legalistic moralism overlook the importance of practicality and flexibility in the law itself.<sup>108</sup>

Fourth, the legalistic moralists' view of international law over-emphasizes military power to the exclusion of non-military means of projecting power.<sup>109</sup> For example, a state may project its power through a puppet government in another state, but at the same time preserve the "outward attributes" of that government's sovereignty.<sup>110</sup> As a result, legalistic moralists may not save the very people they hope to help.<sup>111</sup> For example, the United Nations—championed by the legalistic moralists—did nothing for the people of eastern Europe under domination by the former Soviet Union.<sup>112</sup> Because the former Soviet Union generally avoided using military force in eastern Europe, with the notable exceptions of Hungary in 1956 and the former Czechoslovakia in 1968, legalistic moralists and the U.N. were less concerned than they ought to have been about eastern European independence.<sup>113</sup>

Fifth, legalistic moralists wrongly assume a domestic issue will not become an international problem, *i.e.*, that domestic disputes are not a source of international instability.<sup>114</sup> They envision a world of states that are either internally tranquil or beset with problems confined to their borders and of no relevance beyond.<sup>115</sup> In fact, the world community often is forced to choose among rival claimants to power within a particular state. Bosnia, Burma (Myanmar), Cambodia, Lebanon, and Cyprus are recent

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<sup>106</sup> See KENNAN, *supra* note 97, at 103.

<sup>107</sup> *Id.*

<sup>108</sup> *See id.*

<sup>109</sup> *See id.* at 103-04.

<sup>110</sup> *Id.* at 104.

<sup>111</sup> *See id.*

<sup>112</sup> *See id.*

<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

cases of domestic problems spilling onto the world stage and compelling the world community to sort out the disputes.

Sixth, legalistic moralists grossly overestimate the efficacy of collective sanctions.<sup>116</sup> The more inclusive a military coalition, the lower the least common political denominator on which all coalition members agree.<sup>117</sup> To broaden membership, the scope and depth of the substantive basis for membership must be sacrificed.<sup>118</sup> Worse still, there is a law of diminishing returns applicable to coalition building.<sup>119</sup> As yet another state is added to the team, the marginal contribution of that state to the team diminishes vis-à-vis the marginal contribution of the previous addition.<sup>120</sup>

Kennan saves his most powerful criticism of legalistic moralism for last.<sup>121</sup> By linking law and morality, the legalistic moralists carry over concepts of right and wrong to the affairs of state, presuming that state behavior is susceptible to moral judgment.<sup>122</sup> Lawbreakers, by virtue of their moral inferiority, are targets of not only moral indignation but sometimes physical punishment, *i.e.*, war.<sup>123</sup> Yet, when legal moralists endorse war to punish the transgressor, they know no bounds.<sup>124</sup> Blinded by high moral principles, they demand the complete submission of, and unconditional surrender by, the transgressor, and are willing to wage total war to achieve their end.<sup>125</sup> This result is both ironic and dangerous. Legalistic moralism seeks to eliminate war, yet it “makes violence more enduring, more terrible, and more destructive to political stability than did the older motives of national interest.”<sup>126</sup>

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<sup>116</sup> *See id.*

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

<sup>121</sup> *See id.* at 105.

<sup>122</sup> *See id.*

<sup>123</sup> *See id.*

<sup>124</sup> *See id.*

<sup>125</sup> *See id.*

<sup>126</sup> *Id.*

The pragmatic reader of *International Rules* will be tempted to accept Kennan's arguments in light of Natural Law theory and its continuing influence in some quarters, most likely because they seem more in tune with how the world works. She may be inclined to reinforce the arguments with examples of her own. For instance, perhaps the savagery of the Iran-Iraq War illustrates Kennan's seventh argument. The two-page excerpt from Dean Acheson, which points out that much of international law is really "a body of ethical distillation,"<sup>127</sup> reinforces the temptation. Acheson is willing to admit only a procedural benefit from international law, namely, it calls for delays before taking drastic action, and that such cooling off periods allow for the views of adversaries to be considered.<sup>128</sup> Possibly, the temptation would be easier to resist had the Editors included in *International Rules* an excerpt from a defender of legal moralism. An excerpt on Wilsonian idealism, for example, would allow a legalistic moralist to speak directly and forcefully to the reader, rather than through a critic.<sup>129</sup>

### C. *The Effect of International Law on State Behavior*

Does international law "matter" in the sense of influencing state behavior? If so, then why? For example, do states comply with international law, and if they do, what is motivating them to comply? International legal and international relations theorists obviously need to know which potential constraints on state behavior are effective if these theorists are to propose ways of fostering stability and peaceful change. If international law is irrelevant in mitigating disputes and managing crises, the theorists should pursue the use of other possible tools.

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<sup>127</sup> Dean Acheson, *Remarks*, in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, 57TH ANNUAL MEETING 13 (1963), reprinted in INTERNATIONAL RULES, *supra* note 1, at 107.

<sup>128</sup> See *id.* at 107-08.

<sup>129</sup> See, e.g., AUGUST HECKSCHER, WOODROW WILSON chs. 7-11 (1991). For a critical discussion of Wilsonian idealism, see RONALD STEEL, TEMPTATIONS OF A SUPERPOWER 82-101 (1995).



### 1. *Classical Realism*

Both schools of Realist thought, Classical Realism and Neo-Realism (also known as Structural Realism) find international law to be largely irrelevant. States have no strong motivations to comply with international law in any meaningful sense, namely, when it is contrary to their interests. Classical Realism begins—and to some extent ends—with the premise that the international relations system is anarchical, *i.e.*, that there is no central authority.<sup>130</sup> No doubt this premise will remind the reader of Austinian Positivism and will provoke her to evaluate the importance that Classical Realists put on this point. Given an anarchical system, Classical Realists like Carr, Morgenthau, and Kennan ask rhetorically how international relations can be anything but power politics.<sup>131</sup> There is little systematic theorizing here: states battle to maximize their absolute power positions. International regimes like international law are insignificant—epiphenomal—in this battle.

### 2. *Neo-Realism*

Like Classical Realists, Neo-Realists such as Kenneth N. Waltz and Joseph M. Grieco view sovereign states as the primary actors on the world stage.<sup>132</sup> Also like Classical Realists, Neo-Realists accept the premise of an anarchical world.<sup>133</sup> However, Neo-Realism is to be distinguished from its cousin in at least three respects.<sup>134</sup> First, Neo-Realism is “more theoretically ambitious” than Classical Realism.<sup>135</sup> For Neo-Realists, more can be said about international relations than that they are just power politics: it ought to be possible to develop theoretical insights into these

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<sup>130</sup> See INTERNATIONAL RULES, *supra* note 1, at 96.

<sup>131</sup> See *id.* at 95-96.

<sup>132</sup> See Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485 (1988), reprinted in INTERNATIONAL RULES, *supra* note 1, at 147, 149; ROSENAU & DURFEE, *supra* note 22, at 13-14. For an incisive and highly readable Neo-Realist analysis of international relations, see ROBERT GILPIN, *WAR & CHANGE IN WORLD POLITICS* (1981).

<sup>133</sup> See ROSENAU & DURFEE, *supra* note 22, at 14.

<sup>134</sup> See INTERNATIONAL RULES, *supra* note 1, at 144-45.

<sup>135</sup> *Id.* at 144.

relations.<sup>136</sup> Second, Neo-Realists argue "survival and security are the ends of states, and power [is one of several] means to [achieve] those ends."<sup>137</sup> In contrast, Classical Realists view power maximization as the goal of states.<sup>138</sup> Third, Neo-Realists look for innate characteristics of the international relations system that cause conflict.<sup>139</sup> Classical Realists are satisfied with the observation that all conflict is rooted in the lust of states for power.<sup>140</sup>

Interestingly, in spite of these differences, Neo-Realists reach the same conclusion as Classical Realists about the unimportance of international law in affecting state behavior. Indeed, Neo-Realists declare resolutely that international law is an epiphenomenon.<sup>141</sup> Their declaration follows logically from the essential elements of Neo-Realism.<sup>142</sup> First, states are unitary, *i.e.*, each state speaks with one voice.<sup>143</sup> Second, states are rational, *i.e.*, they carefully weigh the costs and benefits of possible actions, assess and order their preferences, and are consistent in choosing among preferences.<sup>144</sup> Third, states are motivated by the will to survive, that is, by their security, not just by power maximization, as the Classical Realists contend.<sup>145</sup> The second and third elements, taken together, mean every state's preferences are ordered as follows: security, economic well-being, and lastly human rights.<sup>146</sup> Security is pre-eminent because without it a state has no sovereignty, and its very existence is in doubt.<sup>147</sup> Fourth, war and diplomacy are the primary means by which states express their power-oriented preferences and realize their power-based

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<sup>136</sup> *See id.*

<sup>137</sup> *Id.*

<sup>138</sup> *See id.*

<sup>139</sup> *See id.* at 145.

<sup>140</sup> *See id.*

<sup>141</sup> *See id.* at 146.

<sup>142</sup> *See* Grieco, *supra* note 132, at 149.

<sup>143</sup> *See* ROSENAU & DURFEE, *supra* note 22, at 12.

<sup>144</sup> *See id.* at 12-13.

<sup>145</sup> *See id.* at 13, 16-19, 24-26.

<sup>146</sup> *See id.* at 13.

<sup>147</sup> *See id.* at 14.

goals.<sup>148</sup> Given the existence of anarchy, ultimately each state can rely only on itself since international organizations or collective state action are unreliable means to express preferences or realize goals.<sup>149</sup> The second, third, and fourth elements explain why Neo-Realists pay little attention to the internal structure, history, or culture of a state: they are irrelevant because every state behaves the same way when faced with the same external stimuli.<sup>150</sup> Finally, and most importantly, Neo-Realists assert that states are positional, meaning they focus on power gains relative to other states as opposed to absolute power gains, as the Classical Realists assume.<sup>151</sup> Differences among states in population size, territory, resource endowment, economic strength, military strength, political stability, and diplomatic competence determine relative power.<sup>152</sup> As positional actors, states face a perpetual security dilemma: an effort by one state to increase its security threatens the position of other states.<sup>153</sup>

These elements, coupled with the premise of anarchy, lead Neo-Realists to scoff at the relevance of international law to state behavior. Indeed, as further discussed below, for Neo-Realists the prospects for cooperation among states are poor. A state may withdraw from agreements, or decline even to enter into negotiations, if it perceives that other states will gain relatively more from cooperation than itself.<sup>154</sup> In brief, Neo-Realism holds that international relations involve “the same damn things over and over again: war, great power security and economic competitions, the rise and fall of great powers, and the formation and dissolution of alliances.”<sup>155</sup>

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<sup>148</sup> See *id.* at 12-13.

<sup>149</sup> See *id.* at 14.

<sup>150</sup> See *id.* at 12.

<sup>151</sup> See *id.* at 11-12, 16-19, 24-26.

<sup>152</sup> See *id.* at 16-19.

<sup>153</sup> See *id.* at 15.

<sup>154</sup> See Grieco, *supra* note 132, at 147.

<sup>155</sup> ROSENAU & DURFEE, *supra* note 22, at 29 (quoting Christopher Layne, *Kant or Cant: The Myth of the Democratic Peace*, INT'L SEC., Fall 1994, at 5, 10).

### 3. *Rational Institutionalism*

Institutionalism—of which there are two primary schools, Rational Institutionalism and Sociological (or Reflective) Institutionalism<sup>156</sup>—is much more optimistic than Neo-Realism about the effect of international law on state behavior. Whereas Neo-Realists argue that international law is a secondary or derivative phenomenon unlikely to influence states in their relative power struggles, Rational Institutionalists such as Robert O. Keohane consider it to be an independent causal factor that can prescribe and constrain state behavior.<sup>157</sup> The Rational Institutional position reflects the different nature of the enterprise: Neo-Realists seek to explain and predict state behavior while Rational Institutionalists want to prescribe pathways for increased cooperation among states.<sup>158</sup> Rational Institutionalism also reflects a rejection of some of the essential elements of Realism.<sup>159</sup>

Rational Institutionalists accept the Realist premise of an anarchic arena, yet they believe that the prospects for cooperation among states, particularly under the auspices of international organizations, are not so poor as the Realists believe.<sup>160</sup> First, states are not as concerned about power and security as the Realists suggest.<sup>161</sup> After all, weapons of mass destruction render war prohibitively costly, and economic interdependence among states is increasing.<sup>162</sup> States view each other as potential partners that can help bolster economic growth and development.<sup>163</sup> Second, “states are [not] unitary or rational actors.”<sup>164</sup> For example, authority is decentralized in some states, so there may

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<sup>156</sup> See INTERNATIONAL RULES, *supra* note 1, at 4.

<sup>157</sup> See *id.* at 145-46.

<sup>158</sup> See *id.* at 145.

<sup>159</sup> See Grieco, *supra* note 132, at 149.

<sup>160</sup> See *id.* at 147; INTERNATIONAL RULES, *supra* note 1, at 166.

<sup>161</sup> See Grieco, *supra* note 132, at 149.

<sup>162</sup> See *id.*

<sup>163</sup> See *id.*

<sup>164</sup> *Id.*

not exist one clear, calculating voice.<sup>165</sup> Third, states are not the only central actors on the world stage.<sup>166</sup> International organizations, multinational corporations (MNCs), labor unions, and political parties represent other leading actors.<sup>167</sup>

Rational Institutionalists not only reject the Realist position that states avoid cooperation but they also explain what motivates states to cooperate.<sup>168</sup> In other words, Rational Institutionalists offer a theory as to why states may be willing to comply with international law. Accepting the Realist premise of an anarchical world, Rational Institutionalists use game theory to conceptualize every state's decision whether to comply with international law.<sup>169</sup> To them, states face a Prisoner's Dilemma: "each state prefers mutual cooperation to mutual non-cooperation," but also prefers cheating to mutual cooperation and "mutual defection to victimization by another state's cheating."<sup>170</sup> Without a centralized sanction mechanism to bind states to their promises, the Prisoner's Dilemma model predicts that "each [state] defects regardless of what it expects the other [state] to do."<sup>171</sup>

Rational Institutionalists emphasize that this prediction need not materialize because of countervailing forces which lead to mutual cooperation.<sup>172</sup> First, states may learn that a tit-for-tat reciprocity strategy—when the Prisoner's Dilemma game is played repeatedly and mutual defection occurs and each state thereby victimizes the other—does not benefit them.<sup>173</sup> A state may offer to cooperate on a conditional basis, *i.e.*, as long as the other state cooperates.<sup>174</sup> In turn, repeated positive experiences with conditional cooperation will reinforce cooperative behavior.<sup>175</sup>

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<sup>165</sup> *See id.*

<sup>166</sup> *See id.*

<sup>167</sup> *See id.*

<sup>168</sup> *See id.* at 147-49, 151.

<sup>169</sup> *See id.* at 151.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *See id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See id.*

<sup>175</sup> *See id.*

Second, states may realize that cooperative behavior can be inexpensive.<sup>176</sup> If international organizations help in the verifying process, the cost of verifying the behavior of another state may be low relative to the benefits of cooperation and to the costs associated with defection and victimization.<sup>177</sup> The United Nations (UN) weapons inspection process is a good example. In other words, cooperation may be economically rational in a cost-benefit sense.

Because they begin with the Realist premise of anarchy and use the Prisoner's Dilemma model, Rational Institutionalists can legitimately claim that they intentionally set out to prove a difficult case. In truth, the world might not be as anarchical as the Realists maintain. In the political realm, the UN ought to count for something; in the economic realm, the International Monetary Fund (IMF), World Bank, and World Trade Organization (WTO) are not trivialities. Moreover, there are well-known, common sense reasons to doubt game theory. How are the payoff values formulated? The theory's predictions depend on the initial payoff values established. What happens when states are involved in an infinite number of plays? States are, after all, repeat players. Against a background of Realism, therefore, Rational Institutionalists attempt to make a credible case that international law matters and explain why states have an incentive to comply with it.

Neo-Realists, at least, remain unpersuaded.<sup>178</sup> First, they find an erroneous hidden assumption in the argument: a state's only goal remains to maximize their absolute power, or in the lingo of the Prisoner's Dilemma model, to maximize their individual total long-term payoffs.<sup>179</sup> In fact, states may not always define themselves in such individualistic terms.<sup>180</sup> Indeed, they may work together on certain problems.<sup>181</sup> More importantly, survival and

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<sup>176</sup> *See id.*

<sup>177</sup> *See id.*

<sup>178</sup> *See id.* at 153-60.

<sup>179</sup> *See id.* at 153-54.

<sup>180</sup> *See id.* at 155.

<sup>181</sup> *See id.* Grieco notes, for example, that states look at a relationship with another state as a means to prevent that other state from making relative gains. *See id.*

security, not absolute power maximization, are the central aims of every state.<sup>182</sup> Therefore, according to the Neo-Realists, states worry about much more than cheating by other states: as positional actors, their concern lies in gains and losses relative to other states.<sup>183</sup> Second, Neo-Realists point out that concerns about relative positions significantly constrain the willingness of states to cooperate.<sup>184</sup> Rational Institutionalists forget that anarchy means more than a lack of central authority to enforce international law.<sup>185</sup> It also means that no central authority provides protection from threats to survival and security, *i.e.*, from cheaters.<sup>186</sup> Consequently, states may seek to maintain a balance of power, particularly if that balance suits their survival and security interests.<sup>187</sup> States may sustain this balance through war or forcible intervention, military alliances or coalitions, or diplomatic strategies (*e.g.*, moderation, vigilance, or the payment of compensation).<sup>188</sup> Where cooperation occurs, Neo-Realists would likely argue that hegemonic power compelled it; thus, cooperation endures only as long as the other states perceive hegemon as a legitimate leader.<sup>189</sup>

The above discussion clarifies that Rational Institutionalists admire and use economic tools of analysis, including game theory. Interestingly, in this regard two different Institutionalism camps, Modern Sociological Institutionalists and Post-Modern Sociological Institutionalists, oppose them.<sup>190</sup> All three camps agree that international law matters and affects state behavior. However, Sociological Institutionalists highlight what the Rationalist camp leaves out when considering the evolution of regimes and their importance: culture, norms, values, history, and

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<sup>182</sup> See *supra* notes 146-147 and accompanying text.

<sup>183</sup> See Grieco, *supra* note 132, at 155.

<sup>184</sup> See ROSENAU & DURFEE, *supra* note 22, at 24-25.

<sup>185</sup> See Grieco, *supra* note 132, at 155.

<sup>186</sup> See *id.*

<sup>187</sup> See *id.*

<sup>188</sup> See ROSENAU & DURFEE, *supra* note 22, at 22-24.

<sup>189</sup> See *id.* at 26.

<sup>190</sup> See INTERNATIONAL RULES, *supra* note 1, at 166.

discourse.<sup>191</sup> Further, whereas Modern Sociological Institutionalists, like Rational Institutionalists, accept the realist premise of an anarchical international arena, Post-modern Sociological Institutionalists tend to reject this premise.<sup>192</sup>

#### 4. *Regime Theory*

Undeterred by the Realist counter-attack, both Rational and Sociological Institutionalists focus much more on "regimes," and less on states, than do Realists. A "regime" is a set of "principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area."<sup>193</sup> Thus, for example, a body of international law, including the attendant institutional apparatus, could qualify as a "regime." As for the four elements of a "regime," (1) "principles are beliefs of fact, causation, and rectitude"; (2) "norms are standards of behavior [manifest] . . . in rights and obligations"; (3) "rules are specific prescriptions or proscriptions for action"; and (4) "procedures are practices for making and implementing [decisions]."<sup>194</sup> Principles and norms are the defining features of a regime.<sup>195</sup> If they change, then the regime changes.<sup>196</sup> In contrast, a change in rules or procedures is a change within the regime.<sup>197</sup> If any of the four elements of a regime becomes less coherent, or if actual state behavior becomes inconsistent with the regime, then the regime is weakened.<sup>198</sup>

Conceptually, a regime is an intervening variable.<sup>199</sup> It stands between, on the one hand, basic causal variables (*e.g.*, egoistic

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<sup>191</sup> *See id.*

<sup>192</sup> *See id.*

<sup>193</sup> Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185 (1982), reprinted in INTERNATIONAL RULES, *supra* note 1, at 167. For full treatments of Regime Theory, see REGIME THEORY AND INTERNATIONAL RELATIONS (Volker Rittberger ed., 1993); INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983).

<sup>194</sup> Krasner, *supra* note 193, at 168.

<sup>195</sup> *See id.* at 169.

<sup>196</sup> *See id.*

<sup>197</sup> *See id.*

<sup>198</sup> *See id.* at 170.

<sup>199</sup> *See id.* at 171.



self-interest, power, norms and principles, usages and custom, and knowledge) that clearly influence state behavior and, on the other hand, actual behavioral outcomes.<sup>200</sup> Indeed, these basic causal variables can lead to the creation of, and cause change in, a regime.<sup>201</sup> It follows a regime is not a mere agreement among states, because an agreement is a one-shot, temporary transaction.<sup>202</sup> A regime is designed to promote agreements and facilitate cooperation.<sup>203</sup> "Cooperation" means state actions are brought into conformity with one another through policy coordination.<sup>204</sup> It is distinct from "harmony," where one state's policies automatically facilitate the goals of another state, and from "discord," where one state's policies hinder the realization of another state's goals.<sup>205</sup>

The debate between Rational Institutionalists/Regime Theorists and Realists is about the relative importance of basic causal factors versus regimes in affecting state behavior. Naturally, Realists argue that Regime Theorists over-emphasize the common interests and sense of community among states. Rational prudence alone will not necessarily compel states to cooperate.<sup>206</sup> States may need to be compelled into cooperation through a hegemonic power.<sup>207</sup> Further, targeting Sociological Institutionalists such as Andrew Hurrell who advocate Regime Theory, Realists point out that the normative dimension of international law, manifest in human rights law or international environmental law, operates on the minds and emotions of individuals within states. This force can undermine or destabilize regimes. To the extent a Regime Theorist pursues normative ends, she risks sacrificing order.<sup>208</sup>

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<sup>200</sup> See *id.*

<sup>201</sup> See *id.* at 175-83.

<sup>202</sup> See *id.* at 171.

<sup>203</sup> See *id.* at 168.

<sup>204</sup> See Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 379 (1988), reprinted in INTERNATIONAL RULES, *supra* note 1, at 187, 188.

<sup>205</sup> See *id.*

<sup>206</sup> See *id.*

<sup>207</sup> See *id.*

<sup>208</sup> See Andrew Hurrell, *International Society and the Study of Regimes: A*

Regime Theorists counter that state behavior is susceptible to governance by a regime.<sup>209</sup> They admit basic causal variables can and do assert a direct impact on state behavior.<sup>210</sup> But, they insist these variables also operate on state behavior indirectly, through regimes, and that regimes themselves exert their own independent influence.<sup>211</sup> Regime Theorists are unwilling to yield to the Realist position that conceptualizing regimes as standing between basic causal variables and behavioral outcomes obscures the importance of basic causal variables.

Regime Theorists' confidence in a regime's ability to exert an impact on state behavior is based on analysis of projected interactions among states. As suggested in the above discussion of Institutionalism,<sup>212</sup> Regime Theorists offer by analogy the Prisoner's Dilemma as just one instance where a regime can affect state behavior.<sup>213</sup> There are, however, more examples. "Chicken," where two states are headed on a collision course and neither is inclined to change course, is another situation.<sup>214</sup> In this situation, a regime may help avoid a disastrous outcome.<sup>215</sup> Still another instance where a regime can make a difference is where it is difficult to coordinate the logistics of cooperation because of high transaction or enforcement costs.<sup>216</sup> A regime might lower those costs, for example, by providing a forum for negotiations or an infrastructure for enforcement.<sup>217</sup> Here again, the UN weapons inspection system illustrates the point. Yet another example is where states have an incorrect or incomplete information set, are uncertain about the array of choices they face and the risks and probabilities associated with each choice, or have unrealistic

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*Reflective Approach*, in REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 193, at 49, reprinted in INTERNATIONAL RULES, *supra* note 1, at 206, 215-16.

<sup>209</sup> See Krasner, *supra* note 193, at 171-73.

<sup>210</sup> See *id.* at 171.

<sup>211</sup> See *id.*

<sup>212</sup> See *supra* notes 168-91 and accompanying text.

<sup>213</sup> See Krasner, *supra* note 193, at 172.

<sup>214</sup> See *id.*

<sup>215</sup> See *id.*

<sup>216</sup> See *id.*

<sup>217</sup> See *id.*

expectations. A regime can facilitate cooperation by providing knowledge, reducing uncertainty, and stabilizing expectations.<sup>218</sup>

A final example might be the provision of public goods. Where no single state may be willing to internalize the costs of providing such goods, a regime of several states may agree to act jointly and thereby share the cost.<sup>219</sup>

In general, then, for Regime Theorists, "regimes can have an impact when Pareto-optimal outcomes could not be achieved through uncoordinated individual calculations of self-interest."<sup>220</sup> In an increasingly globalized environment, the number of problems demanding coordinated action is growing. For instance, military conflicts and pollution can spill over borders, and foreign exchange crises and stock market gyrations can spread from one country to the next. Thus, regimes matter because they provide a critical functional benefit: they allow states to coordinate their behavior to achieve a desired solution to a particular problem.<sup>221</sup>

Sociological Institutionalists add a few more points in defense of Regime Theory against the Realist assault. First, a regime can provide a state with legitimacy.<sup>222</sup> By virtue of its membership in a regime, for example the observance of international law, a state is "somebody" in the world arena. Second, this membership also can provide validation in a normative sense, *i.e.*, a state may believe in the obligatory nature of a regime because the regime is founded on Natural Law principles.<sup>223</sup> Third, Realists overemphasize the importance of state positionality. States may have a common cultural tradition that facilitates communication, conveys a sense of moral obligation, and imparts a common value system.<sup>224</sup> Fourth, while Regime Theory implicitly assumes cooperation among states has an intrinsic value, it does not presume that every

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<sup>218</sup> See Keohane, *supra* note 204, at 195.

<sup>219</sup> See *id.* at 176-77.

<sup>220</sup> Krasner, *supra* note 193, at 172. A Pareto-optimal outcome is one in which at least one party is made better off, and no other party is made worse off. See THE MIT DICTIONARY OF ECONOMICS 323 (4th ed. 1992).

<sup>221</sup> See Keohane, *supra* note 204, at 195-99; Hurrell, *supra* note 208, at 211-12.

<sup>222</sup> See Hurrell, *supra* note 208, at 213-14.

<sup>223</sup> See *id.* at 215-16.

<sup>224</sup> See *id.* at 216-17.

regime *ipso facto* is good or benign. There is a distinction between the order provided by a regime and the just nature of the regime. Thus, it may be quite appropriate that the normative dimension of international law undermines or destabilizes a regime.<sup>225</sup>

Interestingly, scholars influenced by the Natural Law tradition expand Regime Theory one further step.<sup>226</sup> These scholars argue that every state feels constrained by principles, norms, or rules, and they observe a diminution in the sovereignty of states due to cross-border networks of elites and cross-border movements of persons.<sup>227</sup> Thus, whereas Realists view regimes as unnecessary clutter between basic causal variables and state behavior, and Regime Theorists view regimes as intervening variables that can independently or by incorporation of basic causal variables affect state behavior, scholars in the Natural Law tradition see regimes as pervasive in every facet of international affairs.<sup>228</sup> According to Natural Law Theorists, regimes influence, and are influenced by, state behavior.<sup>229</sup> Moreover, regimes and outcomes are infused with normative significance.<sup>230</sup> For instance, a market, one example of a regime, is not sustained merely by calculated self-interest, but also by a broad social understanding about the virtues of efficiency and transactional freedom.<sup>231</sup>

As is clear from the above discussion, Regime Theory generally has been the province of international relations theorists. Where do the international legal theorists stand on this debate? To answer this question, it is useful to remember the fundamental issue at stake: whether, and how, competing sovereign states in an anarchical world can cooperate. The international legal theorist's perspective on the debate may well depend on her specialty. For example, Regime Theory makes eminent sense to an international

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<sup>225</sup> See *id.* at 219-20.

<sup>226</sup> See Krasner, *supra* note 193, at 173-74.

<sup>227</sup> See *id.*

<sup>228</sup> See *id.* at 174-75.

<sup>229</sup> See *id.* at 175.

<sup>230</sup> See *id.* at 173-74.

<sup>231</sup> See *id.* at 174.

trade lawyer, a point discussed in Part III below.<sup>232</sup> However, to a national security specialist, who is certainly used to operating in a world of zero-sum games, the concept of a regime indeed may be clutter. There is, however, one Realist criticism of the Regime Theory upon which lawyers will agree, regardless of their specialty. Regime Theory does not explain the impact of domestic politics on state behavior, nor on the inclination of states to cooperate with one another.<sup>233</sup> It must be noted, however, that Realism is wanting in this respect as well, since Realists view states as unitary-rational actors.

### III. Suggestions for Improvement

As explained in Part II, *International Rules* is a great work of interdisciplinary scholarship which provides an excellent discussion of the various approaches to critical issues facing international legal and international relations theorists. There are, however, three areas for improvement. First, the Editors should reconsider the unwieldy excerpt on New Stream Theory. Second, an excerpt on Turbulence theory would provide a modern perspective to global trends. Finally, the Editors should consider emphasizing practical applications of the theories discussed to give the theories additional vitality and meaning to practitioners and academics alike.

#### A. Rethink the New Stream Selection

The Editors of *International Rules* included an excerpt on "New Stream" theory which is an utter waste of space in the book.<sup>234</sup> It is precisely the kind of incomprehensible gibberish that gives legal academics a bad name among practicing lawyers and marginalizes them even within the legal academy. Consider this nebulous passage: "A sources discourse which operated completely within the rhetoric of either consent or systemic considerations would seem doctrinal, but it would not be able to

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<sup>232</sup> See *infra* notes 234-94 and accompanying text.

<sup>233</sup> See Hurrell, *supra* note 208, at 220-22.

<sup>234</sup> See David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L. L.J. 1-12, 28-39 (1988) (lectures I & III), reprinted in INTERNATIONAL RULES, *supra* note 1, at 230-52.

avoid a more substantive face.”<sup>235</sup> The sentence would be excusable if it were an isolated incident. Unfortunately, however, the excerpt is replete with sentences in which the words as strung together are infathomable. A few pages later, for instance, the reader is edified by the following passage: “Jurisdiction doctrine, seeking independence from substance, asserts its objectivity and elides reliance upon substantive notions of territory and statehood.”<sup>236</sup> Many readers will be left with the indelible impression that jargon triumphs in New Stream theory, and worse yet, that the jargon is a veil covering a thin layer of substantive knowledge regarding international law, particularly real world specialties like international trade law.

Furthermore, the New Stream excerpt is the printed version of two lectures.<sup>237</sup> Clarity and cogency are two of the attributes of a good lecture. A published version means that the lecturer/author has had two chances to achieve this. Thus, no reader should tolerate an incoherent, impotent published lecture. There are many examples from the international relations literature in which the lecturer/author did present a cogent and clear lecture. Ronald Steel’s 1995 book *Temptations of a Superpower*, based on a presentation, uses an easy-going yet forceful style.<sup>238</sup> Steel argues that America’s Cold War victory is inchoate because it has not yet figured out how to translate its military might into political power.<sup>239</sup> Many readers of the New Stream excerpt will be left hankering for Steel-like expression.

Fortunately, the Editors of *International Rules* provide a much more approachable understanding of New Stream theory in their three-page introduction to this area.<sup>240</sup> The Editors explain that there are two “insights” of the New Stream Theory. First, the theory posits that international law is not an objective enterprise but rather is based on ideology.<sup>241</sup> Second, the theory suggests that

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<sup>235</sup> *Id.* at 243.

<sup>236</sup> *Id.* at 245.

<sup>237</sup> See INTERNATIONAL RULES, *supra* note 1, at 230 (Editor’s footnote).

<sup>238</sup> See RONALD STEEL, *TEMPTATIONS OF A SUPERPOWER* (1995).

<sup>239</sup> See *id.* at 1-23, 121-39.

<sup>240</sup> See INTERNATIONAL RULES, *supra* note 1, at 227-29.

<sup>241</sup> See *id.* at 227.

international law is essentially oppositional in nature.<sup>242</sup> It is replete with inherent contradictions, and, therefore, manipulable by decision makers.<sup>243</sup> However, these “insights” are nothing more than the application of Marxist and Critical Legal Studies perspectives to international law. They lead New Stream theorists to reject Natural Law Theory and Legal Positivism because both pretend to be objective. They also cause New Stream theorists to focus not on regimes or even the substance of international law, but rather on discourse. Nonetheless, the New Stream excerpt is unlikely to add much intellectual value for most readers of *International Rules*. It stands out from the other excerpts in the anthology as unfriendly and empty, and the Editor’s introduction would have been sufficient.

### *B. Consider Post-International (Turbulence) Theory*

The space devoted to New Stream theory could be better utilized by including a selection from a new, exciting, and substantively meaningful school of international relations theory known as “Post-International” or “Turbulence” theory. This theory is developed by James N. Rosenau and Mary Durfee in chapters two through four of their stimulating 1995 book, *Thinking Theory Thoroughly*.<sup>244</sup> Rosenau and Durfee argue that profound changes with respect to three parameters—micro, macro-micro, and macro—cast doubt on the continuing vitality of both schools of Realism.

The “micro” parameter concerns the skills of individuals across countries.<sup>245</sup> Rosenau and Durfee argue that individuals are more competent than ever before at assessing their position in world political affairs and the global economy, and they are now better able to mobilize into collectives.<sup>246</sup> For instance, individuals have formed cross-border non-governmental organizations like Amnesty International and Greenpeace in order to participate in

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<sup>242</sup> See *id.* at 228.

<sup>243</sup> See *id.*

<sup>244</sup> ROSENAU & DURFEE, *supra* note 22, at 9-69.

<sup>245</sup> See *id.* at 34-35.

<sup>246</sup> See *id.* at 35-36, 67.

international human rights.<sup>247</sup> They have also built cross-border business empires in order to participate in overseas wealth creation and distribution.<sup>248</sup> The authors then assert that the improvement in micro-level skills is largely due to technological advancements that allow more information to flow more quickly to more places than ever before.<sup>249</sup> Fax machines, e-mail, and the Internet are obvious examples. Cable News Network (CNN), to take another example, "is said to be on and continuously watched in every embassy and every foreign office of every country in the world."<sup>250</sup> CNN is followed by many non-diplomatic personnel in many countries as well.

The "macro-micro" parameter refers to authority structures (e.g., central governments) linking citizens and their collective organizations to world politics and the global economy.<sup>251</sup> Rosenau and Durfee point out that traditional authority structures, to which individuals have habitually complied simply because they were expected to do so, are in crisis.<sup>252</sup> Individuals and their collective organizations no longer yield unquestioningly to the dictates of a government.<sup>253</sup> Rather, they assess the legitimacy of a government using performance criteria and ask a Reaganesque question: is government serving the people, or are people serving the government?<sup>254</sup> When dissatisfied with the response, individuals and their collectivities choose between one of two strategies.<sup>255</sup> They either seek to relocate authority upward (a centralizing tendency, exemplified by the European Union), or they seek to relocate it downward (a decentralizing tendency, illustrated, for example, in Quebec).<sup>256</sup> Both strategies are clear challenges to sovereignty, for no longer is it assumed that a

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<sup>247</sup> See *id.* at 66.

<sup>248</sup> See *id.*

<sup>249</sup> See *id.* at 46-47.

<sup>250</sup> *Id.* at 47; cf. *id.* at 64.

<sup>251</sup> See *id.* at 34, 37.

<sup>252</sup> See *id.* at 37-40.

<sup>253</sup> See *id.* at 37.

<sup>254</sup> See *id.*

<sup>255</sup> See *id.* at 39.

<sup>256</sup> See *id.*



connection exists between the authority and sovereignty of a state.<sup>257</sup> As Mancur Olson suggests in his 1982 classic, *The Rise and Decline of Nations*, special interest groups look to a state only to obtain resources for themselves.<sup>258</sup> By implication, if they are dissatisfied, they seek changes in the authority structure itself. This challenge is particularly acute for governments in developing countries.<sup>259</sup> Because their sovereignty is of the negative sort, they are unable to address their problems successfully. As a result, the gap between their people and individuals in developed countries is wide and widening. People in developing countries are, therefore, increasingly disinclined to express fealty to the governments that have failed them.

The third parameter, the "macro" level, concerns the overall structure of global politics and economics.<sup>260</sup> While Realists rightly observe that the world is anarchical, they incorrectly presume a state-centric world dominated by sovereign, unitary-rational states, which no longer exist.<sup>261</sup> The world is now multi-centric, and the Realists are wrong to disregard its features.<sup>262</sup> The skill revolution at the micro level and authority crises at the macro-micro level mean there are two groups of actors on the world stage: sovereignty-bound actors (SBAs), which are states, and sovereignty-free actors (SFAs).<sup>263</sup> SFAs include MNCs, ethnic, religious, and linguistic groups, and political and interest group movements.<sup>264</sup> No longer are states the master of their own existence.<sup>265</sup> They are subject to capital inflow or outflow

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<sup>257</sup> There are several works heralding the demise of sovereignty and the end of the nation state. See, e.g., KENICHI OHMAE, *THE END OF THE NATION STATE* (1995); John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 *CARDOZO L. REV.* 903 (1996).

<sup>258</sup> See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* chs. 1-4 (1982).

<sup>259</sup> See ROSENAU & DURFEE, *supra* note 22, at 54.

<sup>260</sup> See *id.* at 34, 40-42.

<sup>261</sup> See *id.* at 40-42, 58-60.

<sup>262</sup> See *id.* at 60-61.

<sup>263</sup> See *id.* at 40-44.

<sup>264</sup> See *id.* at 40.

<sup>265</sup> See *id.* at 48-49 (noting that the state has become "an instrument for adjusting the national economy to the exigencies of an expanding world economy").

decisions made by MNC managers.<sup>266</sup> No longer are "local" issues confined to localities.<sup>267</sup> Environmental, criminal, and health problems are not restricted by national borders. No longer do people view their primary allegiance as owed to the state.<sup>268</sup> They identify with sub-groups along ethnic, religious, and linguistic lines.<sup>269</sup>

Thus, in the Realist paradigm, SBAs interact reciprocally on a bilateral basis according to the rules of war or diplomacy.<sup>270</sup> In contrast, in the new multi-centric world, SFAs interact among themselves and with SBAs in fast-moving flows, or cascades, that stimulate still more interaction.<sup>271</sup> While both SBAs and SFAs seek to preserve their autonomy, security needs are just one of an array of complex issues at stake.<sup>272</sup> Military power is not obsolete, but in fact states rarely employ violence due to the horrendous consequences of war. Accordingly, the traditional Realist instruments of power are giving way to economic, organizational, and informational tools to achieve desired outcomes.<sup>273</sup> In turn, the number of subjects on which a crisis may erupt has proliferated.<sup>274</sup> Crises are not limited to threatened physical clashes (*e.g.*, the Iraq weapons inspection dispute), but may pertain to market access (*e.g.*, the openness of the Japanese market to imports), environmental calamities (*e.g.*, Chernobyl), threats to health (*e.g.*, mad cow disease), or foreign exchange volatility and fears of contagion (*e.g.*, the Mexican peso crisis and the Asian currency crisis).

In sum, there are simply more actors on the stage engaging in

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<sup>266</sup> *See id.*

<sup>267</sup> *See id.* at 49-50.

<sup>268</sup> *See id.* at 50-54.

<sup>269</sup> *See id.* at 53-54.

<sup>270</sup> *See id.* at 64-67.

<sup>271</sup> *See id.*

<sup>272</sup> *See id.* at 61-62.

<sup>273</sup> *See id.* at 62-63. For a fascinating empirical study on the effect of the distribution of power on war and international trade, which argues that the relationship is not monotonic, see EDWARD D. MANSFIELD, *POWER, TRADE & WAR* (1994).

<sup>274</sup> *See* ROSENAU & DURFEE, *supra* note 22, at 167-69, 172-75.

more behaviors with more underlying concerns than ever before.<sup>275</sup> With skills improving at the micro level, authority being relocated at the macro-micro level, and interaction patterns shifting at the macro level, the inevitable result is global turbulence.<sup>276</sup> International relations are not, for the Turbulence Theorist, just the “same damn thing” repeated *ad infinitum*.<sup>277</sup>

Turbulence Theory is of great consequence for the international legal theorist since it ascribes a more important role to international law than does Realism. Turbulence Theory sees international law bursting into new areas, and SFAs advancing their aims and conceptions of justice through such law.<sup>278</sup> One such area is international trade law. To the international trade lawyer, the Turbulence paradigm accords perfectly with global trends. True, Members of the WTO are SBAs. But, their interactions are influenced heavily by SFAs. This observation leads to a third suggestion concerning *International Rules*, namely, why not consider some of the theoretical discussions in the context of global commerce?

### C. *Emphasize International Trade Law Applications*

There are a number of points in *International Rules* where the international trade lawyer may find herself wanting an application of a theory to the lawyer’s specialty. Such explorations would give the anthology a more practical feel. Moreover, they might increase the vitality of certain theories and affect the outcome of some of the debates. Three possible applications are discussed below.<sup>279</sup>

#### I. *Whether International Trade Law is “Law”*

One striking example is the discussion of Legal Positivism. The post-Uruguay Round international trade law system seems to

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<sup>275</sup> See *id.* at 44-46.

<sup>276</sup> See *id.* at 42-44.

<sup>277</sup> *Id.* at 68.

<sup>278</sup> See *id.* at 64-65.

<sup>279</sup> For more information on the details of international trade law mentioned in the examples below, see RAJ BHALA, *INTERNATIONAL TRADE LAW: CASES AND MATERIALS* (1996).

satisfy even Austin's narrow formula for "law." There is a central legislature, namely the WTO Ministerial Conference.<sup>280</sup> There is a central adjudicator, the WTO panels and Appellate Body.<sup>281</sup> There is a central enforcer, namely the Dispute Settlement Body (DSB) (*i.e.*, the WTO Council meeting on a dispute settlement matter).<sup>282</sup> A post-Uruguay Round rule is, therefore, a command of a centralized body backed by the threat of retaliatory trade measures.

Perhaps Austinian Positivists will object that the WTO exists only at the pleasure of sovereign states, and that its commands are not really issued, interpreted, or enforced by a single sovereign because states are themselves sovereign and thus not susceptible to legal sanction. That objection simply means the basis for post-Uruguay Round international trade law is the consent of the addressees of the law, and consent (as distinct from morality) is for Legal Positivists the source of law. Moreover, the objection misses the practical reality that real workers and industries in a target country will feel the effect of trade sanctions if their government fails to comply with a WTO panel or Appellate Body ruling. In other words, potential targets would not view themselves as immune from international trade sanctions.

Likewise, the international trade lawyer will find the Kelsen excerpt unbalanced. The entire analysis is in the context of the laws of war. Furthermore, Kelsen argues that *Grundnorm*, the idea that states behave as they always have, urges preservation of the international *status quo*. The world of the international trade lawyer, however, is one of global economic integration through wealth-creating transactions. The nature, power, and wealth of

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<sup>280</sup> See Marrakesh Agreement Establishing the World Trade Organization art. IV, para. 1, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 6 (1994), 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

<sup>281</sup> See generally Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775 (1996-97) (discussing the evolution of international trade law). For a stimulating discussion of effective supranational adjudication influenced by the New Haven School, albeit in the context of the European Court of Justice and European Court of Human Rights, with applications to the United Nations Human Rights Committee, see Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

<sup>282</sup> See WTO Agreement, *supra* note 280, art. IV, para. 3.

traders are in flux, and the rules by which they transact often change, sometimes radically, but more often through evolution. In other words, it is a world in which the laws of war are of little every-day importance, and preservation of the *status quo* is a laughable and foolish aspiration.

## 2. *Whether International Trade Law Matters*

Another example of where *International Rules* might benefit from a greater focus on applications to international trade law is the discussion about the relevance of international law to state behavior. To an international trade lawyer, both Classical and Neo-Realism seem primitive, pessimistic, and uninformed. States may have behaved in the way these schools suggest during the mercantilist period a few centuries ago, or even as recently as the Smoot-Hawley Tariff era of the 1930s. But, since 1947, when the General Agreement on Tariffs and Trade (GATT)<sup>283</sup> took effect, states have paid greater attention to what international trade rules say. More significantly, since January 1, 1995, when the far-reaching and detailed Uruguay Round agreements entered into force, WTO Members seem to be working much harder at conforming their behavior to the mandates set forth in the agreements. After all, if a Member breaches its obligations, it cannot block adoption of adverse WTO panel or Appellate Body reports, nor can it stave off retaliation by the victorious WTO Member. Worse yet for the Realists, the international trade law regime seems to belie the Realist premise of anarchy and non-cooperation. Over 130 countries have joined the WTO,<sup>284</sup> and each thereby has committed itself to a single undertaking whereby it accepts all of the multilateral trade agreements and hence foregoes attempts at free riding.<sup>285</sup> In sum, the Classical and Neo-Realists base a generalization about state interaction on observations about public international law, with no understanding of contemporary international trade law. Following the Cold War, economic

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<sup>283</sup> General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>284</sup> See *WTO Web Site* (last modified Jan. 14, 1998) <<http://www.wto.org>>.

<sup>285</sup> See Jeffrey J. Schott, *Challenges Facing the World Trade Organization*, in *THE WORLD TRADING SYSTEM: CHALLENGES AHEAD* 3, 4 (Jeffrey J. Schott ed., 1996).

growth and development have become the dominant concerns of nearly every state. Thus, the Realists miss the mark because the real action in international law is in the trade realm.

### 3. *International Trade Law as a Regime*

The discussion of Regime Theory is another place where *International Rules* would benefit from a practical application to international trade law. It seems indisputable that the world trading system is a "regime," as it is a set of principles, norms, rules, and procedures around which state expectations have converged in a given area.<sup>286</sup> There are norms contained in GATT and the Uruguay Round agreements about the treatment of trading partners, such as most-favored nation.<sup>287</sup> and national treatment.<sup>288</sup> Further, there are also rules in GATT and in these agreements about maintaining and suspending such treatment.<sup>289</sup> There are procedures in the Uruguay Round *Understanding on the Rules and Procedures Governing the Settlement of Disputes*, for instance, about how WTO panels<sup>290</sup> and the Appellate Body<sup>291</sup> are to go about adjudicating cases, how the WTO Dispute Settlement Body is to adopt panel and Appellate Body decisions,<sup>292</sup> how WTO Members are to comply with the decisions,<sup>293</sup> and what happens in the event of non-compliance.<sup>294</sup> If international trade law indeed is a regime, then why not consider how and why the regime has

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<sup>286</sup> See Jock A. Finlayson & Mark W. Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, in INTERNATIONAL REGIMES 273 (Stephen D. Krasner ed., 1983) (describing GATT as a regime and discussing its features).

<sup>287</sup> See GATT art. I.

<sup>288</sup> See *id.* art. III.

<sup>289</sup> See, e.g., *id.* art. XXVII (allowing a contracting party to withhold or withdraw concessions under certain circumstances); *id.* art. XXVIII (allowing modification of scheduled concessions under certain circumstances).

<sup>290</sup> See *Understanding on Rules and Procedures Governing the Settlement of Disputes* art. 12, WTO Agreement, *supra* note 280, Annex 2.

<sup>291</sup> See *id.* art. 17.

<sup>292</sup> See *id.* art. 16 (adoption of panel reports); *id.* art. 17, para. 14 (adoption of Appellate Body reports).

<sup>293</sup> See *id.* art. 21.

<sup>294</sup> See *id.* art. 22.

evolved, how the regime might become more coherent, and how the behavior of WTO Members might become more consistent with the regime? Why not consider whether the Uruguay Round agreements, and for that matter the North American Free Trade Agreement (NAFTA), represents a change in or within the regime?

#### IV. The Death of Meta Theory?

*International Rules* is not for the lazy reader. Every page requires careful attention, and some pages must be re-read to appreciate the true depth of the points the author is making or to see how these points relate to one another. There is no doubt the effort is worth it, because this anthology identifies and discusses great issues at the intersection of international legal and relations theory in a very provocative manner.

One conclusion the reader of *International Rules* might reach is that no single international legal or relations theory adequately resolves all of the issues. For example, as one Neo-Realist admits, Realism might be better suited for national security affairs, whereas Institutionalism might be appropriate for international economic matters.<sup>295</sup> Likewise, one Rational Institutionalist sighs, "no general theory of international politics may be feasible."<sup>296</sup> There are too many different actors, state and non-state, involved in too many issues, from sea-bed mining rights to carriage of goods by sea, for one theory to work for all. But, to make life more difficult for the theorist, increasingly the actors and issues overlap. Human rights, cross-border pollution, and foreign direct investment are hardly distinct matters any more.

Thus, perhaps *International Rules* is a harbinger of the death of meta-theorizing, i.e., attempts to develop one model to explain all. The anthology might provoke the reader to explore middle range theories, which may be developed through a synthesis of admirable features of existing meta theories, but which make up in explanatory or predictive power what they lack in grandeur. If so, the Editors have performed a very useful service to this area of study.

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<sup>295</sup> See Grieco, *supra* note 132, at 159.

<sup>296</sup> Keohane, *supra* note 204, at 187.

